Beverly California Corporation d/b/a York Terrace Nursing Center a/k/a Beverly Enterprises Pennsylvania, Inc. d/b/a York Terrace Nursing Center and District 1199P, Service Employees International Union, AFL-CIO, CLC. Case 4-CA-25579

November 16, 1998 DECISION AND ORDER

BY MEMBERS FOX, LIEBMAN, AND HURTGEN

Pursuant to a charge and an amended charge filed on December 30, 1996, and July 14, 1997, respectively, the Acting General Counsel of the National Labor Relations Board issued a second amended complaint and notice of hearing on August 19, 1998, alleging that the Respondent has violated Section 8(a)(5) and (1) of the National Labor Relations Act by refusing the Union's request to bargain following the Union's certification in Case 4–RC–18564. (Official notice is taken of the "record" in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(g); Frontier Hotel, 265 NLRB 343 (1982).) The Respondent filed an answer admitting in part and denying in part the allegations in the second amended complaint.

On September 21, 1998, the Acting General Counsel filed a Motion for Summary Judgment and Memorandum in Support. On September 22, 1998, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed a response.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment¹

In its answer to the second amended complaint and in its opposition to the Acting General Counsel's motion, the Respondent admits that the Union requested it to bargain but denies that it has failed and refused to bargain with the Union.² The Respondent is attacking the valid-

¹ Members Liebman and Hurtgen did not participate in the underlying representation case. Member Hurtgen does not necessarily agree with it. However, he agrees that the Respondent does not raise any new factual matters, and thus summary judgment is appropriate. Similarly, although there are court decisions which may well be inconsistent with the legal conclusion reached in the representation case, Member Hurtgen agrees, for institutional reasons, not to challenge that representation case in this certification testing 8(a)(5) case. See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941). Finally, and for the same reasons, Member Hurtgen does not pass on the effort herein to further support the conclusion reached in the representation case.

ity of the certification on the basis of the Board's unit determination in the representation proceeding.

Specifically, the Respondent argues that the unit is inappropriate because its licensed practical nurses (LPNs) are supervisors within the meaning of the Act. It asks the Board to reconsider the underlying representation case and alleges as "special circumstances," the decision of two courts of appeals which disagreed with Board findings that the nurses in those cases were employees within the meaning of Section 2(3) of the Act.³

The representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding. The Respondent does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, and its assertion of "special circumstances" here provides no basis for the Board to reexamine the decision made in the representation proceeding.

In the representation case, the Board granted review of the Regional Director's decision, and after careful consideration of the record, the Board affirmed the Regional Director's determination that the LPNs in this case are not supervisors. It would be contrary to our long-settled policy to allow the parties to relitigate representation case issues in "test of certification" unfair labor practice proceedings, absent newly discovered or previously unavailable evidence or special circumstances. See *Pitts-burgh Plate Glass Co. v. NLRB*, supra.

Further, the Respondent's citation to the decisions of the Third and Sixth Circuits is selective and fails to acknowledge that the Board's position on the supervisory status of nurses has been upheld by the Eighth, Ninth, and District of Columbia Circuits. *Lynwood Health Care Center, Minnesota, Inc. v. NLRB*, 148 F.3d 1042 (8th Cir. 1998), enfg. 323 NLRB No. 200 (July 3, 1997) (not published in Board volumes); *Grandview Health Care Center v. NLRB*, 129 F.3d 1269 (D.C. Cir. 1997), enfg. 322 NLRB No. 54 (Oct. 15, 1996) (not reported in Board volumes); *Providence Alaska Medical Center v. NLRB*, 121 F.3d 548 (9th Cir. 1997), enfg. 321 NLRB No. 100 (July 10, 1996) (not reported in Board volumes).

Moreover, in the Third Circuit case, *Passavant Retirement & Health Center v. NLRB*, 149 F.3d 243 (3d Cir. 1998), denying enf. 323 NLRB 598 (1997), the court specifically stated it was "not creating a per se rule that LPNs are supervisors," 149 F.3d at 249. Indeed, each case must be decided on its own facts. In our Decision on Review in the representation case, we considered the entire factual record and concluded that the Respondent's assertion that the LPNs are supervisors is not supported by that record. For example, the mere fact that an LPN reports an incident without making a recommendation is

² Although the Respondent denies that it has refused the Union's request to bargain, nowhere in its answer or response does the Respondent contend that it has offered to meet and bargain with the Union since its initial request. On the contrary, it is clear from the Respondent's second amended answer and its opposition that the Respondent is in fact refusing to bargain with the Union in order to test the certification. Accordingly, we find that no issues warranting a hearing are raised by the Respondent's denial of the foregoing allegation. See *Indeck Energy Services*, 318 NLRB 321 (1995).

³ Passavant Retirement & Health Center v. NLRB, 149 F.3d 243 (3d Cir. 1998); and Altercare of Hartville v. NLRB, 129 F.3d 365 (6th Cir. 1997).

not evidence of authority to make effective recommendations. Indeed, issuing a report without any recommendation, which is then independently investigated, does not establish Section 2(11) supervisory status. Ten Broeck Commons, 320 NLRB 806, 812 (1996). Nor is providing input to the director of nursing (DON) a recommendation. Indeed, as the Regional Director found, the DON took over the evaluation process in 1994. While oral input is requested of the LPN by the DON, it is the DON who prepares the evaluation. Significantly, these evaluations have no bearing on contractually scheduled raises and there is no evidence of adverse action taken against a certified nursing assistant (CNA) based on an unsatisfactory evaluation. And, contrary to the Respondent's contention, there is virtually no evidence that the LPNs are involved in the processing of grievances filed by a CNA. Thus, the instant case is factually distinguishable from Passavant in which the court found that the nurses had the authority to adjust grievances and to discipline aides by sending them home for flagrant misconduct. Accordingly, we grant the Motion for Summary Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, a California corporation, has been engaged in providing nursing care, inpatient medical and professional care, and services for the elderly, sick, and infirm at facilities throughout the United States, including at the facility involved here known as York Terrace Nursing Center, located at 24th and West Market Streets, Pottsville, Pennsylvania.

During the 12-month period preceding the issuance of the complaint, the Respondent, in conducting its business operations, derived gross revenues in excess of \$100,000 and purchased and received at the Nursing Center goods valued in excess of \$10,000 directly from points outside the Commonwealth of Pennsylvania. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, has been a health care institution within the meaning of Section 2(14) of the Act, and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Certification

Following the election held July 5, 1995, the Union was certified on September 23, 1996,⁴ as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

All full-time and regular part-time Licensed Practical Nurses and Graduate Practice Nurses employed by the Employer at the Nursing Center; excluding Registered Nurses, all other employees, professional employees, guard and supervisors as defined in the Act.

The Union continues to be the exclusive representative under Section 9(a) of the Act.

B. Refusal to Bargain

On or about October 14, 1996, the Union, by letter, requested the Respondent to bargain and since on or about October 14, 1996, the Respondent has failed and refused. We find that this failure and refusal constitutes an unlawful refusal to bargain in violation of Section 8(a)(5) and (1) of the Act.

CONCLUSION OF LAW

By failing and refusing on and after October 14, 1996, to bargain with the Union as the exclusive collective-bargaining representative of employees in the appropriate unit, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union and, if an understanding is reached, to embody the understanding in a signed agreement.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by the law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); *Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817 (1964); *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

ORDER

The National Labor Relations Board orders that the Respondent, Beverly California Corporation d/b/a York Terrace Nursing Center a/k/a Beverly Enterprises Pennsylvania, Inc. d/b/a York Terrace Nursing Center, Pottsville, Pennsylvania, its officers, agents, successors, and assigns, shall

- 1. Cease and desist from
- (a) Failing and refusing to bargain with District 1199P, Service Employees International Union, AFL—CIO, CLC as the exclusive bargaining representative of the employees in the bargaining unit.
- (b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

⁴ In response to the complaint allegation that the Union was certified as the exclusive bargaining representative of the employees in the bargaining unit, the Respondent denies the averments as the unit described "is not appropriate as it is composed of supervisory and/or management employees. Therefore, the Respondent had no obligation to bargain with the Union." This response does not deny the certification which, in any event, is clearly shown in the underlying proceedings.

- 2. Take the following affirmative action necessary to effectuate the policies of the Act.
- (a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit on terms and conditions of employment, and if an understanding is reached, embody the understanding in a signed agreement:

All full-time and regular part-time Licensed Practical Nurses and Graduate Practice Nurses employed by the Employer at the nursing center; excluding Registered Nurses, all other employees, professional employees, guard and supervisors as defined in the Act.

- (b) Within 14 days after service by the Region, post at its facility in Pottsville, Pennsylvania, copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 4 after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 14, 1996.
- (c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a re-

⁵ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

sponsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT fail and refuse to bargain with District 1199P, Service Employees International Union, AFL-CIO, CLC as the exclusive representative of the employees in the bargaining.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit:

All full-time and regular part-time Licensed Practical Nurses and Graduate Practice Nurses employed by us at the nursing center; excluding Registered Nurses, all other employees, professional employees, guard and supervisors as defined in the Act.

BEVERLY CALIFORNIA CORPORATION D/B/A YORK TERRACE NURSING CENTER A/K/A BEVERLY ENTERPRISES PENNSYLVANIA, INC. D/B/A YORK TERRACE NURSING CENTER